United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7286

ORIGINAL

To be argued by
WILLIAM T. GRIFFIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

MANUEL M. KOUFMAN,

Plaintiff-Appellant,

against

INTERNATIONAL BUSINESS MACHINES CORPORATION,

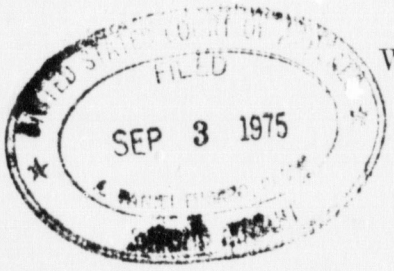
Defendant-Appellee,

BENDERSON DEVELOPMENT COMPANY, INC.,
and JACK CHESBRO,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT



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Other Authorities

§ 5-703. Conveyances and contracts concerning real property required to be in writing

1. An estate or interest in real property, other than a lease for a term not exceeding one year, or any trust or power, over or concerning real property, or in any manner relating thereto, cannot be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing. But this subdivision does not affect the power of a testator in the disposition of his real property by will; nor prevent any trust from arising or being extinguished by implication or operation of law, nor any declaration of trust from being proved by a writing subscribed by the person declaring the same.

2. A contact for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void unless the contract or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing.

3. A contract to devise real property or establish a trust of real property, or any interest therein or right with reference thereto, is void unless the contract or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawfully authorized agent.

4. Nothing contained in this section abridges the powers of courts of equity to compel the specific performance of agreements in cases of part performance.

United States Court of Appeals
FOR THE SECOND CIRCUIT

MANUEL M. KOUFMAN,

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INTERNATIONAL BUSINESS MACHINES CORPORATION,

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BRIEF FOR PLAINTIFF-APPELLANT

Issue Presented

Was reversible error committed when the Southern District Court (Inzer B. Wyatt, D.J.) granted partial summary judgment, dismissing plaintiff's first cause of action for breach of contract? Stated more particularly: Did the District Court err in holding that as a matter of law from the face of the offer and acceptance "no enforceable agreement was created between the parties"? (269a).*

The decision below appears at 263a-274a; and is reported in 295 F. Supp. 784.

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* Numerals in parentheses refer to the pages of the Joint Appendix. References to depositions below not in the Joint Appendix will be noted as "not printed".

Judge Wyatt refused to provide in the partial summary judgment for an immediate appeal (274a). At length, in April 1975, the parties settled and disposed of the balance of the complaint (276a-1, 2, 3), and Cannella, D.J., who had succeeded to the case, directed judgment under Rule 54(b), opening the way for this appeal (276a).

Statement of the Case

In April, 1963, defendant-appellee (hereinafter "IBM") had acquired control of a 6.6 acre parcel of land in Cranford, N. J. (126a-128a). It desired office space there for its Elizabeth, N. J. sales force. In May 1963, it invited financing proposals from a selected list of developers including plaintiff-appellant (hereinafter "Koufman"). The invitation (19a-26a) was on IBM's letterhead and signed by Thomas F. Daly, "Administrator Real Estate Department" (19a). Daly and his superior, George C. Roper, who was "Manager Real Estate Department" (94a, 128a), were well-known in the real estate industry as the operating officials for IBM's branch office construction in the Eastern Region, and so represented themselves (92a). The invitation (19a-26a) prescribed that:

> (i) The developer who was awarded the project, had, within 30 days of award, to buy the parcel controlled by IBM, at an estimated cost of $212,500.
>
> (ii) Developer was to make available the funds to erect the building at an estimated cost of $1,030,000, including architect's charges. IBM had itself contracted with its own chosen architect for plans and specifications (23a; 128a; 131a; 259a), and had itself solicited, from its list of selected contractors, bids to erect the building (259a).
>
> (iii) Developer was to submit rental figures at which, after completion, he would lease the building to IBM. The submission was to be on any one or more or all

of four alternatives prescribed by IBM and the lease was to be 17 years, with options in IBM for three successive 5-year renewals.

The four alternatives referred to in Item (iii) above, were as follows:

(a) A lease of the entire building; IBM to pay maintenance.

(b) Same as (a), but landlord to pay maintenance.

(c) Same as (a) but landlord to take a sublease on 13,264 net sq. ft. for five years.

(d) Same as (b) but landlord to take a sublease on 13,253 net sq. ft. for five years.

(iv) Developer was to specify the prices at which IBM could purchase the building at its option during any of six specified annual periods after completion, under each of the above four alternatives (a, b, c, and d).

(v) Developer was to indicate his "thinking at this time as to whether or not IBM will be responsible to assume the mortgages", and also to "indicate those instances" where he would not be willing to sell the building.

(vi) Developer was to indicate the percentage adjustment of rentals up or down, depending on the variance of actual from estimated cost. There was no provision in the instrument for cancellation in the event the lowest construction bid exceeded any given figure.

(vii) The general conditions contained the following provision (fully considered hereinafter):

"TAXES & INSURANCE: They are not to be considered in this proposal. However, responsibility for these items will be negotiated by the parties at a later date."

Summarizing these essentials: This was an arrangement whereby the successful "bidder" was to (i) purchase land selected and controlled by IBM; (ii) furnish the fees for an architect engaged by and working for IBM; (iii) pay for a building to be built under IBM control, according to the IBM architect's plans and specifications and by a contractor selected by IBM after bidding among IBM invitees to bid; and (iv) lease the building to IBM on the basis selected by IBM out of the four alternative bases that IBM had prescribed (see 259a).

On June 6, 1963, Koufman submitted his offer giving his rental and purchase figures on each of the four alternative proposals and submitting a fifth proposal of his own (29a-32a).

On June 24, 1963, IBM wrote Koufman (94a):

> "We reviewed the bid you submitted for the above mentioned location and after careful consideration found that you were the successful bidder."

requested Koufman to contact IBM's architect, one Victor Lundy, and directed Koufman to purchase the land "for which IBM has arranged in your name."

Between the date of the June 24, 1963, written acceptance by IBM and August 27, 1963, differences arose between Koufman and IBM, each claiming a breach of contract by the other (5a; 8a-9a). With these conflicting claims we are not concerned unless and until this Court restores for trial our cause of action on the contract. However, the following language of the cancellation letter of August 27, 1963 is significant for Daly's admission therein that IBM had "accepted" Koufman's "proposal" and had a "commitment" to him; otherwise stated, that a contract existed:

> "Therefore, in the best interest of the IBM company, we have no alternative but to cancel our previous com-

mitment to you since you are unwilling to perform* in accordance with the terms of your proposal which IBM h. accepted". (95a)

The Decision Below

Judge Wyatt decided on the following three grounds that no enforcible contract was entered into:

(i) New York General Obligations Law § 5.703(2) required, for a contract of leasing for more than one year, a writing "subscribed by the party to be charged, or by his lawful agent thereunto authorized in writing" and neither Roper nor Daly was so authorized.

Judge Wyatt did find that Roper had apparent (but no actual) authority to bind IBM (273a).

[While denying that Roper and Daly had any authority written or otherwise to execute any IBM contract (66a), IBM had conceded that "Roper and Daly were certainly authorized to negotiate the alleged agreement * * *" (Main Memorandum below, p. 9)].

(ii) IBM's acceptance letter was "not sufficient to constitute any agreement because it did not specify which of the various alternatives IBM accepted" (269a).

(iii) The agreement, if any was reached, was "too incomplete, uncertain and indefinite to be enforced", in the following respects:

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* Alleged breach of contract is not germane to this appeal. But in fairness to Koufman it must be said that there is ample proof for a jury to find that he was willing to perform by applying the 7.8 percentage increase provided in the contract if, as happened, the lowest contractor's bid, about $1,650,000 (40a), exceeded the $963,000 estimated building cost in the contract (24a) i.e. $1,030,000 less architect's fees of approximately $67,000. This would have increased the annual rent from $99,600 (31a) to $145,000-$150,000 (40a); and it must also be said that there is ample proof for a jury to find that IBM had gotten another bidder, the Benderson Company, to agree to a $128,000 annual rental (Daly deposition, p. 235, not printed, Koufman deposition, p. 164, not printed), had tried to force Koufman to agree to proceed on that basis and then gave the project to the Benderson Company at that rental (107a) when Koufman insisted on his contract terms (263-1).

(a) it left to future negotiation how the responsibility for taxes and insurance would be *handled*, which Judge Wyatt considered a "significant element". (However, Judge Wyatt concluded that the IBM invitation and the Koufman offer both were based on IBM's liability to absorb these expenses, since otherwise the proposed rental figures would be meaningless (271a)).

(b) There is no provision respecting the date when the building was "required to be completed" (271a).

(c) There is no specification of the date when the 17-year lease was to commence (271a).

(d) It was not made clear whether IBM was to assume outstanding mortgages if it exercised the option to purchase the land and building." (269a).

We shall answer the bases of the decision in the order above stated.

POINT ONE

A

IBM is estopped by its own conduct from invoking the statute of frauds, New York General Obligations Law, § 5-703(2), to invalidate the contract on the basis that Roper lacked written authority.

B

IBM conceded below that Roper had actual authority to negotiate the contract with Koufman. There is evidence from which a jury could find that Roper had actual authority to sign the contract.

A

Judge Wyatt confined himself to a literal reading and application of the statute, oblivious to any possible exceptions or distinctions. He held syllogistically that the statute required written authority, that none existed, and therefore there was no contract (273a).

Simplistic statutory construction was criticized by Judge Learned Hand in *Cabell* v. *Markham,* (C.A. 2, 1945), 148 F. 2d 737, at 739, affirmed 326 U.S. 404 (1945):

> ". . . it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

To the same effect: *Rector etc.* v. *U.S.* (1892), 143 U.S. 457, 512; *U.S.* v. *Kirby* (1868), 74 U.S. 278, 280.

Completely overlooked or disregarded below was the following legal principle:

> American Law Institute, Restatement Agency, 2d (1958) § 43:
>
> § 43. Acquiescence by Principal in Agent's Conduct
>
> (1) Acquiescence by the principal in conduct of an agent whose previously conferred authorization reasonably might include it, indicates that the conduct was authorized; if clearly not included in the authorization, acquiescence in it indicates affirmance.
>
> (2) Acquiescence by the principal *in a series of acts by the agent* indicates authorization to perform similar acts in the future.
>
> Comment:
>
> a. Persons ordinarily express dissent to acts done on their behalf which they have not authorized or of which they do not approve. If the agent has been previously authorized and the extent of his authority is uncertain, the performance of acts by the agent which might reasonably be within the authorization and acquiescence therein by the principal indicates that the parties understood that such acts were au-

thorized, and the rule stated in Section 42 is applicable. If there was clearly no authorization to do the acts, the acquiescence by the principal indicates an affirmance which normally operates as ratification. See § 94.

b. Approval of a single authorized act does not, of itself, justify an inference of authority to repeat it. On the other hand, *if the agent performs a series of acts of a similar nature,* the failure of the principal to object to them is an indication that he consents to the performance of similar acts in the future under similar conditions. These inferences can be rebutted, however, and it can be shown that the agent was not authorized. (emphasis added)

The record discloses at least the following series of acts by IBM agents, Roper, Daly and Chessa (Design Administrator of IBM and a subordinate of Roper's) (137a), the three minor IBM officials with whom Koufman dealt, and of Askew, Miller and other minor IBM officials who dealt on similar projects with others than Koufman. In each instance there is no written authorization showing the agent's authority to bind IBM but IBM has recognized the instruments as binding in every instance but the one at bar.

(i) On July 16, 1962, Chessa as IBM Design Administrator, signed an IBM contract with one Victor Lundy, the architect, committing IBM to pay Lundy $67,928 to design the building on the Cranford parcel (131a-132a; see also 128a). This contract IBM recognized and acted on as valid. The Cranford building was to be constructed by IBM's contractor under Lundy's direction, for Koufman.

(ii) In April, 1963, Roper, as Manager of the Real Estate Department, signed an IBM contract with one Jack Chesbro, of the Benderson Development Company, Inc., authorizing the latter to spend some $200,000 in purchasing on IBM's behalf and in holding for IBM the Cranford

parcel involved here (126a-128a), advising Chesbro to return his signed copy of the contract to Daly. This contract IBM recognized and acted on as valid. Chesbro purchased the land and Koufman was later directed by IBM to acquire the land from Chesbro (94a).

(iii) IBM's May 1963 invitation to submit proposals (19a) was sent out on the IBM letterhead, by Daly as "Administrator Real Estate Department." This invitation requested return of proposals to Daly "the undersigned" and said "*we* would be most happy to entertain such a proposal from you" (emphasis added). This invitation and the resulting proposals (see 20a-32a) IBM recognized as valid and, after first contracting with and then repudiating Koufman, IBM contracted with the Benderson Company, another invitee bidder (104a-125a).

(iv) On June 13, 1963, Roper as Manager of the Real Estate Department signed an IBM contract with Koufman on another unrelated project, providing for the construction of a building at Utica,* New York, and for a 12-year lease thereon with two five-year renewals at $29,250 rent

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* Brusquely discarding (260a, 1st sentence) the terms of contract used by IBM: "successful bidder" "commitment to you" "your proposal * * * accepted", which are plain and unambiguous, Judge Wyatt imagined that the parties "must have contemplated" working up to an agreement on Cranford similar to this one on Utica. There is no basis for this notion. How would it explain IBM's order to Koufman to proceed to buy the land (94a). How would it explain IBM's subsequent cancellation for alleged breach? (267a-268a). The Utica deal was directly negotiated between IBM and Koufman. There was no request for alternative proposals, there were no other proposals submitted, there were no other developers involved; there was no bidding. It was a straight negotiated contract between two parties (104a-125a; Daly, deposition, pp. 43-44, not printed). The irony is that the Utica contract was signed by Roper for IBM (155a) and this fact undoubtedly escaped Judge Wyatt's notice even while he was writing that "it is beyond dispute that he [Roper] had no actual authority to contract for IBM" (273a).

per year (153a-155a). This contract IBM recognized as valid and the building was constructed.

(v) IBM's June 24, 1963 acceptance letter (94a) was on IBM's letterhead signed by Roper as "Manager Real Estate Department". Therein, Roper declares Koufman the "successful bidder" and directs him to proceed to purchase the land "for which IBM has arranged in your name".* This is the instrument which IBM now repudiates because Roper was not authorized in writing to sign it, although IBM concedes that he was "certainly authorized to negotiate it." (IBM main memorandum below (p. 9).) At the same time Daly wrote the other bidders that "we had not accepted their proposals" (Daly deposition, p. 256, not printed; see also, e.g. 254a, ll. 2-8).

(vi) In his letter of August 27, 1963 (95a), Daly purports to exercise authority to *cancel* the previous commitment to Koufman, for alleged breach of the contract which IBM now claims neither he nor Roper could make. In its eagerness to repudiate this contract, IBM carefully avoids mentioning that on its own view of the applicability of the statute here, Daly would need written authority to cancel, i.e., to "surrender" the leasehold contract. See New York Gen. Obligations Law, § 5-703-(1).

(vii) After cancelling Koufman, IBM made a new agreement on the Cranford property (104a-125a) with another bidder, the Benderson Company, through H. Wisner Miller, Jr. (125a). Miller was not an officer of IBM (85a, Art. VI,

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* In his decision (267a-268a) Judge Wyatt says:

"Under date of August 27, 1963, Daly wrote Koufman that IBM had no choice but "to cancel our previous commitment" to him because Koufman would not carry out 'the terms of [his] proposal which IBM had accepted'. Koufman made no arrangements to buy the land in Cranford."

Breach or non-breach is irrelevant here. But if, as he seems to be doing, the Judge was implying that Koufman had breached by not proceeding to buy the land, in fairness to Koufman we point out that there is evidence from which the jury could find to the contrary (47a-48a).

§ 1) and had no written or by-law authority from IBM to bind it. He was President of the Real Estate and Construction Division of IBM (139a), a position akin to that of Roper. This contract IBM recognized as valid and performed.

(viii) An unrelated lease with someone other than Koufman, dated May 22, 1964, was recognized and acted upon by IBM as valid. It is signed by one B. H. Askew "Controller of the Real Estate and Construction Division of IBM", again a position akin to that of Roper (179a-195a). Askew does not appear to have been an officer of IBM or to have had any written or by-law authority to bind IBM (84a, § 10; 85a, Art. VI, § 1). This lease IBM recognized as valid and performed.

(ix) Exactly the same comment applies to a lease dated November 30, 1962, signed by a Division Controller of IBM (199a-218a).

The IBM procedure (above demonstrated) of causing or allowing minor officials, including Roper, routinely to sign contracts and leases without written authority to do so, and in recognizing and performing such contracts and leases, estops it from denying Roper's authority to make the contract in issue. See Restatement Agency 2d, *supra*, p. 7.

An analogous situation arose in *Peter A. Camilli & Sons* v. *The State of New York, etc.* (Court of Claims, 1963), 245 N.Y.S. 2d 521, where an architect had the right to issue orders on contract for additional work but had to do so before the additional work was started or performed. The architect routinely issued such orders, thirty-one in all, after the work was substantially in progress or completed. The State Authority tried to repudiate three of the orders. The Court held that the State Authority's acquiescence during the course of the job, permitted claimant to feel justifiably that the "procedure being followed" was "acceptable" (op. cit. at p. 528), and the orders were held valid.

So in *Application of Eimco Corporation,* 163 N.Y.S. 2d 273 (Sup. Ct. N.Y. Co. 1957). Despite affidavits of the principal and the agent that the agent had no authority to bind the principal to arbitration, the Court held that a course of conduct followed over a year wherein the agent signed contracts containing the arbitration clause, which contracts were recognized and performed as valid, even though no problem of arbitration arose respecting them, raised at least a fact question for the jury respecting the agent's authority (see op. cit. at pp. 279-80).

To the same effect is *Arthur Philip Export Corp.* v. *Leatherton, Inc.,* 275 App. Div. 102 (1st Dept., 1949), 87 N.Y.S. 2d 665.

While the cited decisions deal with authority, rather than written authority, we submit that the principle above-quoted from Restatement, Agency 2d, is equally applicable. IBM fashioned or acquiesced in a procedure for its Real Estate Department that dispensed with the necessity of written authority for the officials of that department, albeit minor officials. These officials routinely dealt with Koufman and others on the basis of that procedure. IBM will not now be heard to disclaim its own action or inaction, its creation of or acquiescence in the procedure followed by its agents.

To justify the inconsistency of its repudiation of Koufman's contract and its recognition of all the other commitments, leases and agreements, IBM stated thus its position at p. 15 of its Reply Memorandum below:

> "* * * the fact that IBM did not assert a statute of frauds defense to any prior agreement actually made on its behalf does not require it, legally or morally to relinquish that defense in an action of this nature."

The contract here was *not an isolated* attempt by Roper to commit IBM without authority. If it were, we would

not be here. Concededly, IBM gave Roper actual authority to *negotiate* the contract (IBM Main Memorandum below, p. 9). In section B of this point, pp. 14 *et seq.*, we outline evidence from which a jury could find that Roper had actual authority to *sign* the Contract. What IBM has the effrontery now to argue is that having given Roper that authority and having itself set up or permitted a course of conduct which dispensed with any need for written authority for Roper, Daly, Chessa, Askew, Miller and other minor, non-officer officials, a course recognized as valid in transactions with others besides Koufman (Items i, ii, iii, vii, viii, and ix, *supra*, pp. 8-11) and in transactions with Koufman other than the one at bar (e.g. Item iv, *supra*, p. 9), a course, in all likelihood, followed in dozens, perhaps hundreds, of transactions throughout its colossal organization, IBM nonetheless can claim the legal and moral right to pick and choose which contracts it shall recognize and which it shall disavow as its own interests dictate *and without concern for those who deal with it in good faith!*

The issue thus boils down to whether this Court is prepared to suffer the Statute of Frauds to be perverted by such dubious argument applied to such deceitful conduct.

We are reminded of what Swan, C.J. said in another context in *Sylvan Crest Sand & Gravel Co.* v. *United States*, 105 F 2d 642 (C.A. 2, 1945):

> "No one can read the document as a whole without concluding that the parties intended a contract to result from the Bid and the Government's Acceptance. If the United States did not so intend, *it certainly set a skillful trap for unwary bidders.* No such purpose should be attributed to the government. See United States v. Purcell Envelope Co., 249 U.S. 313, 318, 39 S. Ct. 300, 63 L. Ed. 620. In construing the document the presumption should be indulged that both parties were acting in good faith." (emphasis added).

IBM argued (in its Reply Brief, below, at p. 12) that the purpose of the statute was to "immunize real estate trans-

actions from evidentiary disputes" respecting an agent's authority. Since IBM, as it admits (IBM main memorandum below, p. 9), gave its agent Roper actual authority to negotiate contracts and set up or permitted the standard procedure followed by him in signing contracts, to allow it to invoke the Statute of Frauds in the present circumstances would be to pervert that conceded legislative intent.

For, as said by Judge Learned Hand in *Crawley* v. *U. S.* (C.A. 2 1959), 272 F. 2d 443, at 445:

> " 'It must be owned that at first blush this appears to be an untenable gloss upon the section. On the other hand, unless they explicitly forbid it, the *purpose* of a statutory provision is the best test of the meaning of the words chosen. *We are to put ourselves so far as we can in the position of the legislature that uttered them, and decide whether or not it would declare that the situation that has arisen is within what it wished. to cover.* Indeed, at times the *purpose may be so manifest as to override even the explicit words used.*' " (emphasis added).

B

IBM conceded below that Roper had actual authority to negotiate the contract with Koufman. There is evidence from which a jury could find that he had actual authority to sign the contract.

Roper had actual authority to "negotiate" the contract. This was conceded below (IBM Main Memorandum p. 9). Flying in the face of this concession, Judge Wyatt said:

> "It is beyond dispute that he [Roper] had no actual authority to contract for IBM." (273a)

and IBM went so far as to have its assistant-secretary, Grady, swear that:

> "Neither George Roper nor Thomas F. Daly, the IBM employees whose correspondence form the memoranda

on which plaintiff relies, was ever authorized by IBM to execute or enter into *any* contract, lease or other instrument on behalf of IBM." (66a, emphasis added).

Naturally, Grady maintains a discreet silence on Roper's concededly actual authority to negotiate the contract and on all the instruments which Roper, Daly, Chessa, Askew, Miller and others did sign and IBM did recognize as valid.

To prejudice Koufman's claim that he dealt in good faith with Daly and Roper, IBM asserted below (15a, paragraph 10; Reply Memorandum, at p. 15) that not only had Roper no authority, written or otherwise, but that Koufman was aware of Roper's lack of authority, that Koufman himself "had testified (i) that on June 19, 1963, he was told by Roper that Roper would have to go to higher authority in order to proceed with the project unless construction costs could be substantially reduced * * * and (2) that on June 24, 1963, the date of Roper's purported acceptance of plaintiff's proposals, efforts to reduce costs had not even been started * * *."

Since Koufman has been quoted in part, and that misleadingly, we consider it important to detail Koufman's deposition and the depositions of IBM employees. These, along with the concession of Roper's actual authority to negotiate with Koufman (IBM Main Memorandum below, p. 9), would amply support jury findings that Roper had full IBM authority to sign with Koufman as he did sign, *without written authority from anyone to do so;* that the only limitation claimed by Roper was as to the amount to which his authority reached; that Roper presumably consulted at the main office as to the amount and later advised Koufman that IBM was going ahead regardless of amount; that in fact, Koufman secured a reduction that brought the contractor's bid within Roper's claimed authority; and that after cancelling Koufman, IBM contracted with the Benderson Company at the reduced figure that Koufman had secured.

When IBM opened the building construction bids on June 19, 1963, the low bid was $1,650,000 (40a) whereas the estimated cost was about $963,000 (24a; $1,030,000, less $67,000 architect's fees). Roper told Koufman (41a):

> ". . . well, we want to save all the money we can because we have an intracompany problem that we're not free to discuss with you. But, in short, you see, *if we meet certain economic factors, we can prosecute this job without going to higher authority.* And if we can't, then all hell breaks loose because we've made a gross mistake and we have to go back to higher authorities. And if you could save us a couple of hundred thousand dollars, that would keep us in the realm of being able to make the judgment quickly ourselves and prosecuting this job." (emphasis added).

and again (260a):

> "Q. What was said on that subject? A. Mr. Roper said that if there was a saving of close to a couple of hundred thousand, that he'd go ahead with it on their own without going to anybody else; if the savings were less than that but more than a hundred thousand, they might have to go to higher authority, which they could do but they preferred not to do."

Thus, Roper asserted actual authority on his own to proceed with a building contract costing not more than about $1,450,000. There is, of course, no suggestion that he needed authority in writing from anyone.

Regarding Roper's authority to make a commitment to Koufman on Koufman's own then pending offer to finance the project (29a-32a), see Koufman's deposition, pp. 106-107, only partly printed at p. 260a of Joint Appendix, as follows:

> "Q. Other than what you have already testified to, was anything else said, during the course of that conversation following the bid-opening, on the subject of

> the authority or lack thereof of the IBM personnel present, Messrs. Roper, Daly and Chessa, to make a commitment to you on the basis of the proposal as it stood following the bid opening? A. No, they indicated to the contrary, that the proposal was in good standing and that they would adhere to the formula and contract as written."

Roper also said to Koufman (Koufman deposition, p. 102, not printed):

> "Give us an hour or so and we'll discuss this back at Park Avenue* and we'll call you if we want to prosecute this contract or have you go to the trouble to see if you can create some economic factors which we hope will be closer to two hundred thousand, *because this is what we can handle without any higher authority.*" (emphasis added).

Later, in the day after consulting at the main office, Roper called Koufman (Koufman deposition, p. 110, not printed):

> "Q. What did Mr. Roper say and what did you say during the course of that conversation? A. [Roper said:] We decided to go ahead with this building as it is. The architect doesn't want to change the design. We'd like you to do all possible to save us at least a couple of hundred thousand dollars. . . ."

Thus was reasserted Roper's authority to proceed without written authority, and to proceed after consultation at headquarters, presumably with his superiors, on the $1,650,000 figure but with the request that Koufman seek a reduction of $200,000 from the low bid contractor. The June 24, 1963, Roper acceptance letter was sent to Koufman five days after the above conversation.

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* This reference is to IBM headquarters at 425 Park Avenue, N.Y.C.

We conclude respecting the subject of Roper's actual authority by observing that a jury could find that Koufman did succeed in securing a reduction of $225,000 from $1,650,000 to $1,425,000 (Koufman deposition, pp. 122-123, not printed). Curiously enough, after dumping Koufman, IBM promptly executed with his replacement, the Benderson Company, through Miller, another of IBM's minor officials, a contract that fixed the estimated building cost at $1,412,131 (107a, ¶ 6).

We need hardly add that on motions for summary judgment, the law is clear that inferences to be drawn from underlying facts contained in the record should be viewed in the light most favorable to the party opposing the motion. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655 (1962); *First National Bank* v. *Pepper*, 454 F. 2d 626 (2nd Cir., 1972); *Empire Electronics Co.* v. *United States*, 311 F.2d 175, 180 (2nd Cir., 1962); *Sommer* v. *Hilton Hotels Corp.*, 376 F. Supp. 297 (S.D.N.Y. 1974); *United Industrial Corp.* v. *Nuclear Corp. of America*, 43 F.R.D. 30 (S.D.N.Y. 1967).

POINT TWO

A

Where, pursuant to the offer, the promisee has the privilege of choosing one of several alternative courses, but the terms of the offer do not require that choice to be made in the acceptance, an acceptance by the promisee is not insufficient because it fails to choose forthwith one of the alternatives but leaves this choice to future specification.

B

IBM actually made a later choice of the form of lease specified under Item I, or at least the jury could so find.

A

Here again, as in our Point One A on the Statute of Frauds, we feel that Judge Wyatt took a most constricted

and simplistic view of contract law. His quotation from the Restatement of Contracts, § 29, was misapplied; a related, applicable principle from the Restatement of Contracts, § 79, was overlooked or disregarded; one of his two cited decisions (*Chicago etc.* v. *Dane*), is inapposite and the second (*Northeastern, etc.* v. *Town of North Hempstead*), was wrongly decided and conflicts with a decision of this Court.

At the outset, the Court will consider the real nature of this contract. Koufman was *financing* (through his mortgage lenders) a branch office for IBM. For him, any one or other form of lease to be selected by IBM was only the tail of the dog. So long as he figured his costs correctly, provided for proper escalation percentage increases over estimated costs, and for recapture of the investment and a profit over the long run, it did not matter to him which of the four alternatives (or of the five, since he added a fifth) IBM chose. Koufman summarized the agreement thus:

> "My responsibility to IBM was to supply the money necessary for purchase of the land and construction of the building and to remain as the landlord. IBM was responsible for the payment to me of a 'net' rent in accordance *with any of the formulae it chose.*" (91a, emphasis added).

So that it concerned him not one whit which alternative IBM chose. He was giving IBM the choice, not vice versa. He did not state anywhere in his offer* that IBM had to make its choice in its acceptance. But Judge Wyatt decided this phase of the case *as though Koufman's offer required an immediate choice.* It is almost as if Judge Wyatt felt that there was some hardship on IBM in that its acceptance letter did not pick then and there one alternative, but left IBM free to make a later choice. From IBM's standpoint, such choice might be delayed until the building

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* The phraseology of the offer was actually IBM's (20a-22a). Only the added figures were Koufman's (30a-32a).

was completed,* at which time and only then lease term could become effective by occupancy. IBM's objection to Koufman's leaving IBM this choice comes with little grace. The objection is one which, were it to be made at all, we would expect from Koufman. But Koufman could not make the objection because he had been content in the terms of his offer not to require IBM to choose at once.

In these circumstances our Point Two heading above correctly states the law. See the Restatement: Contracts (1932), Vol. 1, p. 89, § 79, where appears the following:

> "* * * where the promisee has the privilege of demanding one of several stated performances from the promisor, then if any one of the performances would be sufficient consideration, the promise is a sufficient consideration."

Williston on Contracts (3rd Ed.) Vol. 1 § 44 puts the matter thus:

> "Promises are not infrequent where the promisee is given an option to determine within specified limits or as to a particular matter the performance which he wishes * * *."
>
> "Nor is there objectionable indefiniteness since a means is provided (the promisee's election) for determining the precise thing which the promisor is to do. * * *"

IBM argued below (IBM Reply Memorandum below, p. 3) that the parties labelled the various rights to purchase

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* Judge Wyatt decided against the existence of a valid contract, among other things, on the fact that "nothing was said" about when "was the building required to be completed" and "when was the 17-year lease to commence" (271a). See discussion *infra*, at p. 28. He perhaps did not reflect on or overlooked the fact that *IBM itself* was constructing the building with its own architect and its own contractor (128a). It had agreed to pursue the commencement of the building "as expeditiously as possible" and "anticipated that construction may start early in the summer of 1963" (128a). The Koufman contract, like any contract, impliedly required IBM to proceed to a completion in good faith, in proper, workmanlike fashion.

the property as an option, thus showing they knew when an option was intended; but that they did not so label this privilege of choosing the type of leasehold and therefore no option was intended. Sheer sophistry! This supposes that to have an option, the label *option*, must be applied. The supposition is insupportable. In fact the Restatement, quoted *supra*, calls it a "privilege".

Clearly, neither Williston nor the authors of the Restatement entertained any thought that an acceptance retaining the privilege of choosing thereafter among alternative performances made the contract *ipso facto* invalid. Their only concern was that *each* alternative performance so reserved had to have sufficient consideration to support a contract. Otherwise, the promisee could choose the alternative that had no consideration and thus there would be no contract. Here we have no problem of sufficiency. Each of the four (or five) alternatives has obviously adequate consideration. The promisee (IBM) retained the privilege of choosing the one it preferred.

In point is the decision of this Court, *Sylvan Crest Sand & Gravel Co.* v. *United States*, 150 F. 2d 642 (C.A. 2, 1945).

In *Sylvan*, the plaintiff contracted to deliver trap rock to defendant's project "as required" and in accordance with defendant's delivery instructions. The breach alleged was defendant's refusal to request or accept delivery within a reasonable time.

As at bar, the District Court granted summary judgment to defendant on the ground that the agreement was illusory because the contract stated: "Cancellation by the Procurement Division may be effected at any time."

This Court reversed and remanded for trial. It treated the contract as containing two alternatives either of which defendant might choose: (i) to give delivery instructions and accept and pay for rock; or (ii) to give notice of cancellation within a reasonable time. Each of these alternatives required some act which defendant promised to per-

form and thus furnished consideration for a binding contract.

As in *Sylvan*, respecting choice of requesting and taking delivery or giving notice of cancellation, so here respecting choice by IBM of the one out of four (or five) alternatives, no time was specified for making the choice. That is no objection to validity.

In *Sylvan, supra,* this Court held:

> "Since no precise time for delivery was specified, the implication is that delivery within a reasonable time was contemplated. Algheny Valley Brick Co. v. C. W. Raymond Co., 2 Cir., 219 F. 477, 480; Frankfurt-Barnett v. William Prym Co., 2 Cir., 237 F. 21, 25."

and again:

> "The words should be so construed as to support the contract and not render illusory the promises of both parties. This can be accomplished by interpolating the word 'reasonable', as is often done with respect to indefinite time clauses. See Starkweather v. Gleason, 221 Mass. 552, 109 N.E. 635. Hence the agreement obligated the defendant to give delivery instructions or notice of cancellation within a reasonable time after the date of its 'acceptance'. This constituted consideration for the plaintiff's promise to deliver in accordance with delivery instructions, and made the agreement a valid contract."

IBM by plain implication undertook to notify Koufman within a reasonable time which alternative lease it chose. Such a reasonable time was from IBM's standpoint up to the moment of completion of the building.*

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* That an immediate choice of the type of lease was considered unnecessary by IBM may be seen from statements of Roper and Daly to Koufman to the effect that there were IBM projects where the building was "ready for occupancy before we even sign a lease" (See Koufman deposition, p. 135; not printed). See also id. at p. 163, where Daly said in Roper's presence that IBM was "moving into a building next week and they haven't signed a lease yet * * *".

Compared with *Sylvan,* our case is *a fortiori.* Instead of the alternatives of performance and cancellation as in *Sylvan,* we have here only the right to choose one among different performances.

Erroneous reliance below on the restatement of contracts and on two decisions

The bridge case (*Town of North Hempstead*) relied on by Judge Wyatt below (270a) was unsoundly decided. Under the rationale of *Sylvan, supra,* p. 21, this Court would have held that the contract left to the Town of North Hempstead the privilege of choosing either bridge and required it to notify the contractor of its choice within a reasonable time. This would place no hardship on the contractor. He had offered to build either of the two bridges at his own calculated price for each, leaving to the Town the choice. The Town accepted with the right to choose. There is nothing in logic or common sense that need invalidate such a contract. There is nothing in contract law that necessitates making the selection in the acceptance *unless the offer specifically so requires.*

This is the point at which the text quoted by Judge Wyatt (270a) from the Tentative Draft Restatement of Contracts was misunderstood. The text states that "an acceptance to be effective must comply *with the terms of the offer* and those terms or the circumstances *may* make it plain *that the acceptance must specify terms.*" (emphasis added.) Neither in the bridge case nor our case was there a requirement in the offer that the acceptance must embody an immediate choice. As already noted, the phraseology of the offer is IBM's (20a-22a); only the figures were added by Koufman (30a-32a).

The same comment is applicable to the original (1932) Restatement, Contracts, § 29, which refers to an offer containing a choice of terms "from which the offeree is given the power to make a selection *in his acceptance.*" (emphasis

added). At bar the offer did not require the choice to be made in the acceptance.

Williston on Contracts (3rd Ed.) Vol. 1, § 44, thus puts it:

> "Sometimes this choice on the part of the promisee must be exercised when the offer is accepted. In other cases the option need not be exercised until the time for performance of the contract."

In the second of the two cases relied on by Judge Wyatt (270a), *The Chicago and Great Eastern Railway Company* v. *Dane,* which he calls a "classic decision", the Railroad in a letter sent to plaintiff agreed to receive from plaintiff at New York not to exceed 6000 gross tons of iron during the period of five stated months and transport same to Chicago at the price and on the terms set forth. The plaintiff merely answered "I assent to your agreement and will be bound by its terms". This was held to promise no shipment of iron, that is to say, no performance at all, and thus a *nudum pactum* resulted.

The case has absolutely nothing to do with the validity of the promise of alternative performances each importing consideration.

B

IBM actually made a later choice of the form of lease specified under Item I, or at least the jury could so find.

Thus far we have pointed out that, under applicable legal principles and decisions, the selection of one out of several alternative performances offered need not be made in the acceptance itself where the offer does not so require, but may be made within a reasonable time thereafter.

There is evidence here from which the jury could find that the selection of Item I by IBM was communicated to Koufman on June 19, 1963, even before the acceptance letter of June 24, 1963, and quite definitely was made by August, 1963.

Koufman was advised on June 19, 1963, by Daly and Roper, that IBM was (263a) "interested"* in Item 1 of his proposal.

Daly testified in his deposition (p. 232 not printed):

> "A. As I recall, we had told Mr. Koufman it would not be necessary for him to do Item III, that we could *accept* Item I.
>
> Q. When did that happen? A. Some time during our discussion during August." (Emphasis added)

Furthermore, Daly's analysis of all the proposals contains a large check mark next to Item I on Koufman's proposal (140a, bottom line), buttressing the jury question of IBM's acceptance of that alternative (see 144a; 102a paragraph 18; 263a). In the light of Koufman's and Daly's testimony just quoted, a jury need not accept Daly's claim (144a) that the checkmark referred to Koufman's overall proposal; or agree with Judge Wyatt's acceptance of that as fact (273a, ll. 1-5).

Finally, after ousting Koufman, the IBM lease made with his replacement, the Benderson Company, followed the form of Item I not Item III (104a-125a).

POINT THREE

The contract was not incomplete, uncertain or indefinite in any material respect.

(a)

The items of tax and insurance

With respect to the provision dealing with taxes and insurance quoted at p. 3, *supra,* Judge Wyatt concluded that both IBM's invitation to bid and Koufman's proposal

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* In view of Daly's later use of the word "accept", we need not labor over Judge Wyatt's verbal dissections (272a) on Daly's use of the word "interested". Actually the word was chosen by IBM counsel in putting the question to Koufman. Here again Judge Wyatt was "making a fortress out of the dictionary". See Learned Hand in *Cabell, supra,* p. 7.

necessarily had to be and were based on IBM's financial liability for these items as distinguished from the housekeeping duty of paying them in the first instance. IBM had submitted evidence that the taxes alone would approach $34,000 per year (17a; 15a, paragraph 8). While IBM offered this proof in its argument to invalidate the contract as incomplete, it proved too much. Both IBM's real estate department and Koufman were experienced enough to appreciate the size of the tax and insurance expense, and Judge Wyatt had to and did conclude that on any basis other than IBM's liability to absorb these items, the request for and submission of rental proposals would have been a farce.

See Koufman affidavit (91a) quoting and reasoning as follows:

> " 'Taxes & Insurance: They are not to be considered in this proposal. However, responsibility for these items will be negotiated by the parties at a later date.'
>
> "In other words, at the specific instruction and direction of IBM, the subject matter of taxes and insurance was not to be considered by any persons who submitted bids to them. They were not a factor in the economic considerations of making a proposal. A simple reading of the proposal demonstrates that this was to be a 'net, net' lease. Any person experienced in the real estate industry understands that the cost of such items is borne by the tenant, but devices may be utilized whereby the apparent responsibility for the items may be upon the landlord who may be able to negotiate more advantageously than a large corporation with third parties. It is specious for IBM to assert that this item was in any way relevant to my selection as the developer of this property. They excluded this term from even being considered and quite properly so since it had nothing to do with the awarding of the development contract."

As Koufman further averred (91a-92a):

> "In the industry such *usage* [the term 'net'] clearly means that the tenant (here IBM) is fully responsible for costs of insurance and taxes after occupancy. The proposal specified that IBM's standard form of lease was to be executed, which lease was known to be a 'net' lease. All that the agreement left open for further discussion was the mechanism for handling payment of taxes and arranging for insurance. This is all that was meant by the provision in the request for proposal dealing with later discussion of 'responsibility' for these items. There was no need to determine such an item in connection with the developer's agreement since the costs involved were nominal, involving the work of a bookkeeper or ministerial billing expense." (emphasis added)

So there is here no problem of a major omission that might negate a contract for incompleteness. In any event, Roper admitted that Koufman's proposal was, like that of another bidder, on a "net lease dollar basis" (55a). This and Koufman's above explanation of the industry's usage of the term "net" raised at the least a jury question. See citations, *supra,* p. 18.

The method of handling the payments, left for subsequent decision, i.e. who would pay them *initially,* while IBM paid them ultimately, is inconsequential. Under the terms of the contract Koufman could have paid them, if necessary, and claimed recoupment.

Williston on Contracts (3rd Ed) V. 1 § 48, puts it thus:

> "It happens at times in elaborate contracts that certain minor matters are expressly left for future agreement * * *". It is evident that the question must be one of degree. Is the indefinite promise so essential to the bargain that inability to enforce that promise strictly according to its terms would make it unfair to

> enforce the remainder of the agreement? If the contract cannot be performed without settlement of the undetermined point, each party will be bound to agree to a reasonable determination of the unsettled point in order that the main promise may be enforced."

It is worthy of note that after IBM ousted Koufman, IBM's contract with the Benderson Company provided for Benderson initially to pay these items and then recoup them in full from IBM (108a, paragraph 8; 109a, paragraph 9).

(b) (c)

The failure (b) to specify when the building was to be completed, and (c) when the 17-year lease was to commence (271a), are not, singly or together, of such consequence as to permit IBM to repudiate the contract. IBM was under an implied obligation to Koufman to proceed in workmanlike fashion, and under an express agreement with Chesbro, who acquired and held the land for IBM and for the successful developer, to pursue "as expeditiously as possible the commencement of the building" (128a). After the June 24, 1963 acceptance of Koufman's proposal by IBM, Chesbro held the land subject to IBM's direction to Koufman to acquire it (94a), and IBM's express promise of expedition respecting the building was then for Koufman's benefit. Moreover, the effective term of the lease could not start until completion of the building and IBM was constructing it with its own architect and its own contractor (128a). See footnote on p. 20, *supra*. The option periods for purchase of the building, which were part of the contract and would be part of the formal lease, all commenced to run from completion of the building (32a).

(d)

This item concerns the alleged failure to make clear whether IBM was to assume outstanding mortgages if it exercised the option to purchase (269a)..

In this instance the assumption or non-assumption of mortgages would not change the economic burden of purchasing. Item V of Koufman's proposal (21a) expressly provided that the amounts specified for purchase of the property by IBM "will include the outstanding mortgages." The distinction obviously intended was whether IBM would take "subject to" the mortgages or would "assume" them, the only difference being a charge on the property alone in the first instance, and a corporate liability as well on the bond in the second. But neither involved any change in the cost of the property.

The materiality of taking "subject to" or "assuming" the mortgages need not concern us for two reasons:

In the first place the phraseology of the option to purchase (at 30a) seems to have made this a matter of little or no importance and certainly not anything on which to invalidate a contract for incompleteness or indefiniteness. The option reads:

> "IBM will have an option to purchase the property as specified in Item 5, with the understanding that IBM may have to assume outstanding mortgages. I [The Developer] *have indicated my thinking at this time* as to whether or not IBM will be responsible to assume the mortgages." (emphasis added).

In the second place and even more decisive, a jury could find that there was in fact no failure to make clear that IBM would be expected to assume the mortgages. While Koufman's offer itself (at 31a) does not appear to check either alternative, Daly's analysis sheet accepts and records as Koufman's answer on that point that IBM would have to assume the mortgages (141a, last line, column marked V and answered "yes"). See also Daly's deposition at 146a, lines 2-10, and his lame attempt at 144a, lines 13-25, and 145a, lines 2-12, to transform this answer "yes" into a statement meaning that Koufman was willing to sell the build-

ing. Since no question was asked in the proposal respecting Koufman's willingness to sell, only a request that he indicate "those instances where I would not be willing to sell the building" (31a, Item V) and since Koufman's proposal made no mention of any such instances, Daly's attempt to misinterpret the answer "yes", is a transparent equivocation. On the other hand when Daly was asked about the answer "yes" i.e. "y" given on the same exhibit (141a, line 7, column 5) by the Benderson Company which ultimately replaced Koufman after Koufman was cancelled out, Daly answered ". . . interpreting it here would mean that it would be necessary for IBM to assume outstanding mortgages." (Daly deposition, p. 202, not printed).

Even Daly's attempted explanation, if given footage at all, would raise at most a triable issue of fact which Judge Wyatt had no right to resolve against Koufman. See citations, *supra*, p. 18.

CONCLUSION

The summary judgment should be reversed and the action remanded for trial on the cause of action for breach of contract.

Dated: New York, New York, September 2, 1975.

Respectfully submitted,

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